# MBf Finance Bhd (formerly known as Malaysia Borneo Finance Corporation (M) Bhd) v Ting Kah Kuong & Anor

HIGH COURT (KUCHING) — SUIT NO KG 218 OF 1990
ABDUL KADIR SULAIMAN J
24 JUNE 1993

***Civil Procedure*** *— Pleadings — Striking out of counterclaim — Part of counterclaim related to dealings between plaintiff and another business owned by the defendant — Separate cause of action — Counterclaim vexatious and abuse of process — Rules of the High Court 1980 O 18 r 19 & O 92 r 4*

***Companies and Corporations*** *— Change of name by plaintiff company — Transaction entered into three years after change of name — Printed forms still in old name of plaintiff — Whether defendant intended to contract with plaintiff in its new name — Companies Act 1965 s 23(6)*

***Companies and Corporations*** *— Hire-purchase agreement — Signed under hand of branch manager — Implied authority — Nature of document does not require company seal — Companies Act 1965 s 35(5)*

***Contract*** *— Damages — Mitigation — Whether plaintiff failed to mitigate loss suffered — Whether s 75 of the Contracts Act 1950 is relevant — Contracts Act 1950 s 75*

***Contract*** *— Intention — Change of name by plaintiff company — Printed forms still in old name of company — Whether defendant intended to contract with plaintiff in its new name — Companies Act 1965 s 23(6)*

***Contract*** *— Terms — Signature on last page of agreement — No signatures or initials against certain clauses in agreement — Whether such clauses form part of the agreement*

***Hire Purchase*** *— Hire-purchase agreement — Allegation that agreement was void owing to non-compliance with Hire-Purchase Act 1967 — Whether agreement subject to Hire-Purchase Act 1967 — Whether forklift was a motor vehicle listed in First Schedule to the Hire-Purchase Act 1967 — Hire-Purchase Act 1967 First Schedule*

***Hire Purchase*** *— Hire-purchase agreement — Whether hire-purchase agreement was a 'bill of sale' — Meaning of 'bill of sale' — Whether plaintiff or defendant had exclusive title to goods — Whether agreement void for non-attestation — Bills of Sale Ordinance of Sarawak (Cap 68) s 3*

***Hire Purchase*** *— Non-scheduled goods — Registration of hire-purchase instruments — Whether agreement was registered — Hire-Purchase Registration Ordinance of Sarawak (Cap 71) s 4*

The plaintiff is a licensed finance company incorporated in Malaysia having its registered office in Kuala Lumpur and a branch office at Kuching. By a certificate of incorporation on change of name dated 19 December 1985, the plaintiff changed its name from Malaysia

Borneo Finance Corporation (M) Bhd to MBf Finance Bhd. On 7 April 1989, the plaintiff entered into a hire-purchase agreement ('the hire-purchase agreement') with the first defendant who was then trading as Forward Enterprise. Notwithstanding the change of name of the plaintiff, the plaintiff used a printed form of the hire-purchase agreement which bore the old name of the plaintiff. After execution of the hire-purchase agreement, a copy thereof was sent to the first defendant and on such copy there was stamped the new name of the plaintiff with its Kuching branch address. The subject matter of the hire-purchase agreement comprised of, inter alia, four units of forklifts ('the goods'). The hire-purchase price was RM319,950 and after deducting the initial payment of RM81,500, the balance of RM238,450 inclusive of term charges was to be paid by 35 monthly rental of RM6,624 and one final rental of RM6,610. The second defendant executed a guarantee on the same day the hire-purchase agreement was made. In the guarantee, the name of the plaintiff was in its new name. The first defendant defaulted in payment of monthly rental. By letter dated 29 October 1990 to the first defendant, the plaintiff demanded the first defendant to deliver up the goods but the first defendant failed or refused to do so. The plaintiff was not able to repossess the goods as they were not kept at the address given in the hire-purchase agreement and could not be located. The plaintiff sued the first and second defendants and claimed for a sum of RM198,711.88, interest thereon and costs. The deputy registrar entered judgment for the plaintiff against the first and second defendants under O 14 of the Rules of the High Court 1980 ('the RHC'), and struck out the counterclaim of the first defendant under O 18 r 19 and O 92 r 4 of the RHC. The defendants have appealed.

**Held**, dismissing the appeal:

(1) The plaintiff acquired its new name in 1985, ie some three years and four months before the existence of the hire-purchase agreement between the plaintiff and the first defendant on 7 April 1989. Therefore, the first defendant had intended to contract with the plaintiff and had so contracted by his signing of the hire-purchase agreement though the plaintiff by then had changed its name from Malaysia Borneo Finance Corporation (M) Sdn Bhd to MBf Finance Bhd. Further evidence could also be found in the guarantee between the second defendant and MBf Finance Bhd wherein the number of the hire-purchase agreement was cited. In addition, MBf Finance Bhd with its Kuching address was stamped on the first defendant's copy of the hire-purchase agreement.

(2) From the reply received from the road transport authority, a forklift was not a motor vehicle and therefore the hire-purchase agreement was not subject to the Hire-Purchase Act 1967 ('the Act'). It therefore follows that the agreement was not subject to the Act as the goods were not goods as specified in the First

Schedule to the Act to resist the defence that the agreement was void and unenforceable owing to various non-compliances with the provisions of the Act.

(3) Though it was not a hire-purchase within the provisions of the Act, any hire-purchase instrument involving movable property was required by s 4 of the Hire-Purchase Registration Ordinance of Sarawak (Cap 71) to be so registered. The hire-purchase agreement and the guarantee were contained in a single document which was duly registered with the registrar on 20 April 1989 as shown by the endorsement made at the foot of the guarantee. Therefore, the defendants' defence that the agreement was not enforceable as it was not registered, could not be sustained.

(4) The hire-purchase agreement was signed on behalf of the plaintiff by one Chua Chai Hua, the then branch manager of the plaintiff. Being the representative of the plaintiff, Chua Chai Hua had the implied authority of the plaintiff and the hire-purchase agreement was of a nature that no seal of the company was required.

(5) The title to the property initially vested in the dealer as the original owner of the goods to be sold at the price of RM271,000. This price was paid to the dealer when the dealer received the sum of RM81,000 from the first defendant and the balance RM190,000 from the plaintiff. On receipt of the price, the dealer had divested its title to the goods and such legal title had vested in the first defendant and the plaintiff jointly according to the proportion of the payments made by both of them. By s 3 of the Bills of Sale Ordinance of Sarawak (Cap 68), in order for the hire-purchase agreement in this case to be construed as a bill of sale, the plaintiff or the first defendant must have exclusive title in the goods to the exclusion of the other. The title to the goods was not exclusive to the plaintiff or the first defendant and in the circumstances, the hire-purchase agreement was not a bill of sale.

(6) The plaintiff had demanded that the first defendant delivered up the goods but the first defendant failed or refused to do so. The plaintiff was not able to repossess the goods as they were not kept at the address given in the hire-purchase agreement and could not be located. Therefore, the plaintiff cannot be faulted for non-mitigation of its losses. Moreover, s 75 of the Contracts Act 1950 was irrelevant in this respect as the section refers to liquidated damages and penalty imposed in the contract between the parties in the event of breach.

(7) The terms relating to payment of initial deposit, monthly instalments, and interest on overdue rental or other payments form part and parcel of the hire-purchase agreement. The parties had signed on the last page of the agreement. It was vexatious on the defendants' part to say that just because no signatures or initials appeared against the respective clauses, they did not form part of the hire-purchase agreement.

(8) The counterclaim by the first defendant related to the plaintiff's claim in the action and also to dealings between the plaintiff and the first defendant trading under the name and style of Borneo Welded Mesh. If there was going to be a counterclaim by Borneo Welded Mesh, there must first be a claim by the plaintiff against it. In this case, Borneo Welded Mesh was a stranger to the action. The counterclaim by the first defendant was clearly vexatious and an abuse of the process of court. The whole counterclaim of the first defendant was without any basis and the court therefore allowed the application of the plaintiff under O 18 r 19 of the RHC.

**Obiter:**

The change of name of a company would not absolve it of any rights and obligations before the change took effect. Whatever legal proceedings there were, by or against the company before the change, would not be rendered defective. After the change of name, any legal proceedings pending or which might have been commenced by or against it but for the change of name, may be continued or commenced by or against it by its new name.

**[Bahasa Malaysia summary**

Plaintif merupakan sebuah syarikat kewangan berlesen yang diperbadankan di Malaysia dengan pejabat berdaftarnya di Kuala Lumpur dan sebuah pejabat cawangan di Kuching. Melalui suatu sijil perbadanan atas pertukaran nama bertarikh 19 Disember 1985, plaintif telah menukar namanya dari Malaysia Borneo Finance Corporation (M) Bhd ke MBf Finance Bhd. Pada 7 April 1989, plaintif telah mengikat satu perjanjian sewa-beli ('perjanjian sewa-beli itu') dengan defendan pertama yang pada masa itu berniaga sebagai Forward Enterprise. Tidak kira pertukaran nama plaintif, plaintif menggunakan sekeping borang perjanjian sewa-beli bercetak yang menunjukkan nama lama plaintif. Selepas pelaksanaan perjanjian sewa-beli itu, satu salinan perjanjian itu telah dihantar kepada defendan pertama dan pada salinan itu dicap nama baru plaintif dengan alamat cawangannya di Kuching. Bahan perkara perjanjian sewa-beli itu, antara lainnya, adalah empat unit 'forklift' ('barangan itu'). Harga sewa-beli adalah RM319,950 dan selepas menolak bayaran awal sebanyak RM81,500, baki sebanyak RM238,450 termasuk caj bertempoh mesti dibayar melalui 35 sewa bulanan sebanyak RM6,624 dan satu bayaran sewa akhir sebanyak RM6,610. Defendan kedua melaksanakan satu jaminan pada hari yang sama apabila perjanjian sewa-beli itu dibuat. Di dalam jaminan itu, nama plaintif adalah nama barunya. Defendan pertama mengingkari kewajipannya membuat bayaran sewa bulanan. Melalui sepucuk surat bertarikh 29 Oktober 1990 kepada defendan pertama, plaintif menuntut supaya defendan pertama menghantar balik barangan itu tetapi defendan pertama gagal atau enggan berbuat demikian. Plaintif tidak dapat mengambil semula barangan itu kerana mereka

tidak disimpan di alamat yang diberikan di dalam perjanjian sewa-beli itu dan tidak boleh dijumpai. Plaintif mendakwa defendan pertama dan kedua dan menuntut faedah sejumlah RM198,711.88 dan kos. Timbalan pendaftar telah memasukkan penghakiman bagi plaintif terhadap defendan pertama dan kedua di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), dan membatalkan tuntutan balas defendan pertama di bawah A 18 k 19 dan A 92 k 4 KMT. Defendan merayu.

**Diputuskan**, menolak rayuan itu:

(1) Plaintif telah memperolehi nama barunya dalam 1985, yakni tiga tahun dan empat bulan sebelum wujudnya perjanjian sewa-beli di antara plaintif dan defendan pertama pada 7 April 1989. Oleh itu, defendan pertama berniat mengikat kontrak dengan plaintif dan telah berbuat demikian dengan menandatangani perjanjian sewa-beli itu meskipun plaintif menjelang masa itu telah menukar namanya dari Malaysia Borneo Finance Corporation (M) Sdn Bhd ke MBf Finance Bhd. Keterangan lanjut juga boleh dijumpai di dalam jaminan di antara defendan kedua dan MBf Finance Bhd di mana nombor perjanjian sewa-beli itu dicatatkan. Tambahan pula, MBf Finance Bhd dengan alamatnya di Kuching, dicap pada salinan perjanjian sewa-beli yang dipegang oleh defendan pertama.

(2) Daripada jawapan yang diterima daripada pihak berkuasa pengangkutan jalan, sebuah 'forklift' bukan sutu kenderaan bermotor dan lantaran itu perjanjian sewa-beli itu tidak tertakluk kepada Akta Sewa-Beli 1967. Ini bermakna yang perjanjian itu tidak tertakluk kepada Akta Sewa-Beli 1967 ('Akta itu') kerana barangan tersebut bukanlah barangan seperti yang diperuntukkan di dalam Jadual Pertama kepada Akta itu untuk menentang pembelaan bahawa perjanjian itu adalah tidak sah dan tidak boleh dikuatkuasakan akibat berjenis-jenis ketakpatuhan peruntukan Akta itu.

(3) Walaupun ianya bukan satu sewa-beli mengikut peruntukan Akta Sewa-Beli 1967, sebarang suratcara sewa-beli yang meliputi sesuatu barangan yang boleh digerak adalah diwajibkan oleh s 4 Ordinan Pendaftaran Sewa-Beli Sarawak (Bab 71) supaya didaftar sebegitu. Perjanjian sewa-beli dan jaminan itu terkandung di dalam satu dokumen yang telah didaftar dengan pendaftar pada 20 April 1989 seperti yang ditunjukkan oleh pengendorsan yang dibuat di bahagian bawah jaminan itu. Oleh itu, pembelaan defendan bahawa perjanjian itu tidak boleh dikuatkuasakan kerana ianya tidak didaftarkan, tidak boleh disokong.

(4) Perjanjian sewa-beli itu ditandatangani bagi pihak plaintif oleh seorang bernama Chua Chai Hua yang pada masa itu adalah pengurus cawangan plaintif. Sebagai wakil plaintif, Chua Chai Hua mempunyai kuasa tersirat plaintif dan perjanjian sewa-beli adalah sebegitu jenis sehinggakan meterai syarikat tidak diperlukan.

(5) Hakmilik kepada barangan itu mula-mulanya terletakhak pada peniaga sebagai tuanpunya sediakala barangan itu yang akan dijual pada harga RM271,000. Harga ini telah dibayar kepada peniaga itu apabila beliau menerima sejumlah RM81,000 daripada defendan pertama dan baki sejumlah RM190,000 daripada plaintif. Sebaik sahaja harga itu diterima, peniaga itu telah melepaskan hakmiliknya kepada barangan itu dan hakmilik di sisi undang-undang terletakhak pada defendan pertama dan plaintif bersama-sama mengikut kadar bayaran yang dibuat oleh kedua-dua mereka. Mengikut s 3 Ordinan Bil Jualan Sarawak (Bab 68), supaya perjanjian sewa-beli di dalam kes ini boleh dikatakan satu bil jualan, plaintif atau defendan pertama mesti mempunyai hakmilik eksklusif kepada barangan tersebut dengan mengecualikan yang satu lagi. Hakmilik kepada barangan itu tidak eksklusif kepada plaintif atau defendan pertama dan di dalam keadaan sebegini, perjanjian sewa-beli ini bukanlah satu bil jualan.

(6) Plaintif telah menuntut bahawa defendan pertama menyerahkan barangan itu tetapi defendan pertama telah gagal atau enggan berbuat demikian. Plaintif tidak dapat mengambil semula milikan barangan itu kerana mereka tidak disimpan di alamat yang dinyatakan di dalam perjanjian sewa-beli itu dan tidak boleh dijumpai. Oleh itu, plaintif tidak boleh dipersalahkan kerana tidak mengurangkan kehilangan yang dialaminya. Lagipun, s 75 Akta Kontrak 1950 adalah tidak relevan dalam soalan ini kerana seksyen itu merujuk kepada ganti rugi jumlah tertentu (liquidated damages) dan penalti yang dikenakan di dalam kontrak di antara pihak-pihak itu jika berlakunya keingkaran.

(7) Terma-terma berhubung dengan pembayaran wang cengkeram permulaan, ansuran bulanan dan faedah di atas sewa yang terlewat atau mana-mana bayaran yang lain membentuk sebahagian perjanjian sewa-beli itu. Pihak-pihak itu telah menandatangani pada mukasurat akhir perjanjian itu. Adalah menyusahkan pada belah defendan untuk mengatakan bahawa cuma kerana tidak ada tandatangan atau parap yang kelihatan bertentangan dengan fasal-fasal yang berkenaan, fasal-fasal itu tidak membentuk sebahagian perjanjian sewa-beli itu.

(8) Tuntutan balas oleh defendan pertama bersangkutan dengan tuntutan plaintif di dalam tindakan ini dan juga dengan urusan di antara plaintif dan defendan pertama yang berniaga di bawah nama dan gaya Borneo Welded Mesh. Jika tuntutan balas hendak dibuat oleh Borneo Welded Mesh, mestilah terdapat tuntutan terlebih dahulu oleh plaintif terhadapnya. Di dalam kes ini, Borneo Welded Mesh adalah suatu pihak luar kepada tindakan ini. Tuntutan balas defendan pertama jelasnya menyusahkan dan menyalahgunakan proses mahkamah. Keseluruhan tuntutan balas defendan pertama adalah tanpa alasan dan mahkamah oleh itu membenarkan permohonan plaintif di bawah A 18 k 19 KMT.

**Obiter**:
Pertukaran nama sesuatu syarikat tidak akan membebaskannya daripada sebarang hak dan obligasinya sebelum pertukaran itu berkuatkuasa. Apa-apa tindakan undang-undang yang ada, sama ada oleh atau terhadap syarikat itu, sebelum pertukaran itu tidak akan dijadikan cacat. Selepas pertukaran nama itu, sebarang tindakan undang-undang yang belum selesai atau yang mungkin telah dimulakan oleh atau terhadapnya jika tidak ada pertukaran nama itu, boleh diteruskan atau dimulakan oleh atau terhadapnya dalam nama barunya.]

**Notes**
For cases on hire-purchase agreements, see 7 *Mallal's Digest* (4th Ed) paras 1887–1906.
For cases on mitigation of losses, see 3 *Mallal's Digest* (4th Ed) paras 1041–1044.
For cases on the striking out of a counterclaim, see 2 *Mallal's Digest* (4th Ed) paras 1784 and 1796.

**Legislation referred to**
Bills of Sale Ordinance of Sarawak (Cap 68) s 3
Companies Act 1965 ss 23(6)

*Arthur Lee* (*Arthur Lee & Co*) for the defendants.
*ST Wong* (*Loke King & Co*) for the plaintiff.

*Cur Adv Vult*

**Abdul Kadir Sulaiman J**: This is an appeal by the first and second defendants under O 56 r 1 of the Rules of the High Court 1980 ('the RHC') in respect of the decision of the learned deputy registrar given on 20 August 1991:

(a) entering judgment for the plaintiff against the first and second defendants under O 14 of the RHC for the sum of RM198,711.88 with interest thereon at the rate of 2% per calendar month from 13 November 1990 until the date of full and final settlement;
(b) striking out the counterclaim of the first defendant under O 18 r 19 and under O 92 r 4 of the RHC in respect of the refund to the first defendant by the plaintiff of the sum of RM53,664, interest and costs purported to have been paid under a void hire-purchase agreement entered with the plaintiff, and an order for the plaintiff to repossess the subject matter of the agreement and dispose of it to mitigate the loss suffered by the first defendant and costs; and
(c) ordering the first and second defendants to pay costs of the plaintiff's action and this application for summary judgment.

The grounds of the plaintiff's application before the learned deputy registrar are that:

(a) the first and second defendants have no defence to the plaintiff's action; and
(b) the first defendant's counterclaim discloses no reasonable cause of action, is frivolous and vexatious, may prejudice, embarrass or delay the fair trial of the action or is an abuse of the process of the court.

The plaintiff is a licensed finance company incorporated in Malaysia, having its registered office in Kuala Lumpur and a branch office at Kuching. The business was run under the name of Malaysia Borneo Finance Corporation (M) Bhd until 19 December 1985 when, by virtue of a certificate of incorporation on change of name of company dated 19 December 1985 as exhibited in KKH1 to the affidavit of Kong Kek Hing affirmed on 22 August 1991 in support of the plaintiff's application, the name of the plaintiff company was changed to MBf Finance Bhd. In the course of its business, on 7 April 1989, the company entered into a hire-purchase agreement ('the agreement') with the first defendant as evidenced by KKH2 to the same affidavit. The agreement was executed in Kuching through its branch office here. The agreement is on a printed form GEN/HP. The heading of the agreement form is under the old name of the plaintiff company. The party representing the plaintiff company in the agreement is still in the old name of the company. The name of the addressee in the delivery receipt appearing on the last page of the agreement is still in the old name of the plaintiff company. Therefore, looking at the agreement in KKH2, it would appear as if the plaintiff company has not changed its name at all despite the fact that its name had been changed since 19 December 1985 pursuant to the certificate issued by the registrar of companies as evidenced in KKH1 of the same affidavit of the plaintiff in support of its application. It is clear therefore, that notwithstanding the change of name of the plaintiff company, the plaintiff still used the old form for purposes of its agreement with a third party.

After the execution of the agreement, on a subsequent date, a copy of the said agreement was sent to the first defendant. However, on the first defendant's copy, there being stamped on the document, the new name of the plaintiff company with its Kuching branch address on the top of the document just below the printed heading of the document in the old name of the plaintiff company. Otherwise, the document is identical with the document in KKH2 kept by the plaintiff. The first defendant's copy of the agreement is evidenced by TKK1 to the affidavit in opposition of the first defendant affirmed on 26 September 1991.

The agreement between the plaintiff and the first defendant is for a hire-purchase price of RM319,950. The balance payable under the agreement is RM238,450 after deducting the initial payment made in the sum of RM81,500. The sum of RM238,450 inclusive of 25.5% of term charges was agreed to be paid by 35 monthly rental of RM6,624 and one final rental of RM6,610 commencing on 10 May 1989 and thereafter on or before the tenth day of each succeeding month until the said 36 rental have been paid in full. The goods, the subject matter of the agreement is listed in annexure 'A' to the agreement comprising of two units planers, one unit scraper machine, two units automatic turning lathe and four units forklifts. The

cash price of those goods was quoted as RM271,500. In the agreement, the address of the first defendant is given as No 195, Lorong 2/2, Hui Sing Garden, Kuching. The agreement states that the goods will be kept at Lot 1083, Bintawa Industrial Estate, Kuching. Clause 2 of the agreement states that in default of punctual payment, the first defendant shall pay interest on any overdue hire rental or other payments at the rate of 2% per calendar month. Clause 5(a) provides that if the first defendant defaults in paying the initial payment punctually or any of the hire rental or any other sum payable under the agreement (whether demanded or not), then it shall be lawful for the plaintiff without notice to terminate the hiring or by written notice sent to or left at the first defendant's last known address forthwith to determine the hiring and the first defendant shall forthwith at its expense deliver up the goods to the plaintiff and the plaintiff and its servants or agents shall be entitled without any notice to enter upon any premises where the said goods may be and seize and take possession thereof and to recover all charges, costs and expenses incurred in connection therewith.

The second defendant is the guarantor to the agreement as evidenced by KKH3 to the affidavit of the plaintiff in support of this application. It was executed on the same day as the agreement. In this guarantee agreement, the name of the plaintiff is in its new name, ie MBf Finance Bhd. It recited the Hire-Purchase Agreement No HPRC/NS/455/10/89/TS which is the agreement in KKH2. However, the address of the first defendant is given as Lot 1083, Section 66, Pending Industrial Estate, Kuching and not 195, Lorong 2/2, Hui Sing Garden, Kuching as the address given in KKH2. Pending Industrial Estate is also known as Bintawa Industrial Estate and the lot number in the address is the lot number in the address given in KKH2 being the place where the said goods would be kept. In the particulars of the guarantor, it is stated in the guarantee agreement that the first defendant is the employer of the guarantor/second defendant which address is given as Lot 1083, Bintawa Industrial Estate, Kuching. In the guarantee agreement, the second defendant jointly and severally guarantee, upon written demand being made to her by the plaintiff, the due and punctual payment of all sums which may become due to the plaintiff under or arising out of the hire-purchase agreement and the due performance and observance by the first defendant of each and every term and condition in the said hire-purchase agreement to be performed and observed by the first defendant. The second defendant also will jointly and severally on written demand indemnify the plaintiff against all loss or damage that the plaintiff may sustain under the hire-purchase agreement.

The first defendant defaulted in paying the monthly rental under the agreement with the plaintiff. The plaintiff sued both the defendants pursuant to the two agreements and claimed for a sum of RM198,711.88 as the amount due as at 12 November 1990. This is contained in the amended statement of claim of the plaintiff dated 24 June 1991. One of the items includes the agreed interest on overdue hire rentals to the extent of RM13,251.98.

On 29 July 1991, the first defendant filed its defence and counterclaim.

He admitted signing the agreement with Malaysia Borneo Finance Corporation (M) Bhd, ie the old name of the plaintiff. However, he contends that the agreement and the terms contained therein are invalid and unenforceable against him:

(a) for failure to comply with various provisions of the Hire-Purchase Act 1967 ('the Act');
(b) the term charge of 25.5% is in excess of the rate prescribed by the Act;
(c) failure to register the agreement under the Hire-Purchase Registration Ordinance of Sarawak (Cap 71);
(d) the agreement was not duly executed in accordance with the Companies Act 1965;
(e) the interest rate of 2% per calendar month levied upon overdue instalments is unlawful;
(f) various clauses and terms in the agreement were not duly accepted or agreed upon to be signified by them;
(g) the said goods were sold to the plaintiff by the dealer and the first defendant paid the initial payment of RM81,500 thereby giving no title to the said goods in the plaintiff pursuant to s 7 of the Act;
(h) RM190,000 subsequently paid by the plaintiff to the dealer was in fact a loan to the dealer by way of the dealer pledging the first defendant's goods as security to the plaintiff without interest, in return for which the dealer granted title and property in the goods to the first defendant notwithstanding the fact that the goods were intended for sale to the plaintiff;
(i) the hire-purchase agreement is a bill of sale and void for non-attestation and registration under the Bill of Sale Ordinance of Sarawak (Cap 68); and
(j) the plaintiff has failed to mitigate the loss pursuant to s 75 of the Contracts Act 1950.

The first defendant admitted receiving the letter of demand for payment from the plaintiff but did not pay as in law they are not due to the plaintiff.

The first defendant counterclaims against the plaintiff for a sum of RM53,664 being payments made to the plaintiff under the agreement as a consequence of the plaintiff's lack of title. The sum being a debt due to it under s 30 of the Act. In the alternative, the first defendant claims that he is entitled to an order that the plaintiff repossesses the said goods and disposes of the same to mitigate the plaintiff's loss. Secondly, the first defendant claims against the plaintiff in respect of the transaction involving the plaintiff and the first defendant trading under the name and style of Borneo Welded Mesh.

In the circumstances, the first defendant counterclaims against the plaintiff for:

(a) the sum of RM53,664;
(b) interest thereon at the rate of 8%pa from the date of judgment till the date of full and final payment; and
(c) costs.

In the alternative:

(a) for an order that the plaintiff be compelled to repossess the said goods;
(b) for an order that the plaintiff do dispose of the said goods at the best market price;
(c) for an order that the plaintiff accounts and pays to it the sums representing the difference between the sums due to the plaintiff and the total sum paid by it and proceeds of sale of the said goods;
(d) interest on the sum in (c) above at the rate of 8%pa from the date of judgment till the date of full and final settlement; and
(e) costs.

Further and in the alternative, in relation to the transaction between the plaintiff with Borneo Welded Mesh above mentioned:

(a) the refund of RM60,000 paid to the plaintiff;
(b) interest thereon at the rate of 8%pa from the date of judgment till the date of full and final settlement; and
(c) costs.

On 1 August 1991, the second defendant filed her amended defence dated 31 July 1991. In essence, except for a few other matters, the defence of the second defendant is the same as that of the first defendant on the voidness and unenforceability of the agreement between the plaintiff and the first defendant. However, in the alternative, the second defendant contends:

(a) that the guarantee agreement is in the nature of an indemnity and not a guarantee and the same is void being in contravention of s 22 of the Act;
(b) that the guarantee agreement is void as it contained material misrepresentation about the hire-purchase agreement. The misrepresentation is in regard to the address of the first defendant. She admitted receiving the letter of demand for payment from the plaintiff but did not pay as in law they are not due to the plaintiff.

By a summons-in-chambers dated 22 August 1991, the plaintiff applied under the provisions of O 14, O 18 r 19 and O 92 r 4 of the RHC. The learned deputy registrar who heard the application made the order against the defendants as mentioned in para 1 above, hence the appeal by both the defendants.

*Application against first and second defendant under O 14 of the RHC*

The plaintiff's application is supported by:

(a) affidavit of Kong Kek Hing affirmed on 22 August 1991;
(b) affidavit of Robin Wee Ewe Teck affirmed on 28 September 1991;
(c) affidavit in reply of Kong Kek Hing affirmed on 8 November 1991;
(d) further affidavit in reply of Kong Kek Hing affirmed on 26 May 1992; and
(e) affidavit of Wong Siong Tung affirmed on 26 May 1992.

To oppose the plaintiff's applications, the first defendant filed the following affidavits:

(a) affidavit in opposition of Ting Kah Kuong affirmed on 26 September 1991;
(b) affidavit in opposition of Ting Kah Kuong affirmed on 30 September 1991; and
(c) affidavit in opposition of Ting Kah Kuong affirmed on 23 March 1992.

No affidavit was filed by the second defendants or on her behalf against the plaintiff's application.

In the light of the defendants' defence that the first defendant entered into the agreement with Malaysia Borneo Finance Corporation (M) Bhd (the old name of the plaintiff company) and according to Ting Kah Kuong's affidavit in opposition of 26 September 1991 at para 6 thereof, that to date he had not received any notice of change of name, or notice of legal assignment of the purported hire-purchase agreement with Malaysia Borneo Finance Corporation (M) Bhd, I have first to decide whether there exists a triable issue on the matter. To constitute a triable issue, the issue raised must be relevant. It is conceded by the learned counsel for the plaintiff, in his submission in the hearing before the learned deputy registrar and at this appeal, that Malaysia Borneo Finance Corporation (M) Bhd was the former name of the plaintiff. In effect, what the defendants are saying is that Malaysia Borneo Finance Corporation (M) Bhd and MBf Finance Bhd are two different entities and he entered into the agreement with the former and not with the plaintiff. The learned counsel submitted that in the light of s 23(6) of the Companies Act 1965, the change of name in the circumstances of this case does not affect the identity of the company. Only the name changes but the identity of the company remains. The learned deputy registrar in her decision seems to agree with the submission of the learned counsel for the plaintiff that by virtue of s 23(6) of the Companies Act 1965, the change of name does not affect the identity of the plaintiff or its rights and obligation and therefore held the issue to be non-triable. Section 23(6) states as follows:

> A change of name pursuant to this Act shall not affect the identity of the company or any rights or obligations by the company or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced by or against it by its former name may be continued or commenced by or against it by its new name.

What this subsection in effect means is that the mere change of the name of a company does not affect the identity of the company. The identity of a company is governed by its constitution. For so long as this is not changed, the identity remains. The name given to a company is merely to distinguish it from any other companies, so that no two companies would have the same name in order for one not to be mistaken for the other in the dealings with a third party. Just like a man having a name given to him at birth, the mere change of his name taking place subsequently will not make him a different man. The change of name of a company will not absolve it

of any rights and obligations subsisting before the change took effect. Whatever legal proceedings there were by or against the company before the change will not be rendered defective. However, after the change of name, any legal proceedings pending or which might have been commenced by or against it but for the change of name, such legal proceedings may be continued or commenced by or against it by its new name. So, what has changed consequent upon the change of the name of a company is in the title to the action in so far as the name of the company is concerned. This is pretty obvious because the old name of the company has ceased to exist on account of the change taking place. But in the present matter before the court, the situation is different. The company of the plaintiff acquired its new name in 1985, ie some three years and four months before the existence of the agreement between the plaintiff and the first defendant on 7 April 1989. The defendants could not quarrel if the plaintiff in the agreement was cited as MBf Finance Bhd instead of Malaysia Borneo Finance Corporation (M) Bhd which name had ceased to exist since 19 December 1985. As such, have the defendants by their pleadings raised a triable issue so as to defeat the plaintiff's application under O 14? To answer this, one needs to look at the surrounding circumstances leading to the signing of the agreement. At the time of the signing of the agreement and the guarantee agreement on 7 April 1989 by the first and second defendant respectively, were they conscious that they were in fact entering into the agreements with the company by whatever name it was called?

To that extent, exhs KKH10, 11 and 12 annexed to the affidavit in support of the plaintiff affirmed on 22 August 1991 are relevant to consider. The said goods the subject matter of the agreement were initially the property of Hup Seng Hin Machinery Trading, Kuching ('the dealer'). KKH10 is an invoice dated 30 April 1989 from the dealer addressed to MBf Finance, Kuching *for the account of the first defendant* (emphasis added). The total cost for the said goods was RM271,000 less the down payment of RM81,500 leaving a net balance of RM190,000. At the bottom of the invoice was a note: 'Terms three years under HP to MBf Finance'. So, as at that date, the first defendant was not a stranger to the invoice notwithstanding the remark 'Terms three years under HP to MBf Finance' appearing at the bottom of the said invoice. If not, why should it be for the account of the first defendant? So, there was then the connection between the first defendant and the plaintiff company in relation to the said goods.

KKH11 has as its heading 'Dealer's invoice' and it is dated 7 April 1989 which is the date of the agreement. It is addressed to the plaintiff referring to annexure 'A' which comprised of goods in annexure 'A' to the agreement. The total amount in each annexure 'A' is RM271,500. On KKH11 itself, the cash price of the goods is quoted as RM271,500 less deposit of RM81,000 (which is the amount of the down payment in KKH10) leaving a balance of RM190,000. In the 'Dealer's invoice' there is a clause as follows:

> I/We agree to sell the goods at the cash price and as described above to you, and *delivery will be given to the hirer on your behalf* on your acceptance of the transaction. I/We further agree that this invoice shall be considered pro forma until notification of acceptance is received by us. (Emphasis added.)

KKH10 is addressed to the plaintiff for the account of the first defendant, and the said goods, according to KKH11, were to be delivered to the hirer on behalf of the plaintiff. So, taking the two documents together, the hirer referred to in KKH11 can be no other than the first defendant. According to para 7 of the defence of the first defendant and para 8 of the amended defence of the second defendant, it was the first defendant who paid the down payment of RM81,000 to the dealer in respect of the said goods. This is the initial cash payment mentioned in the agreement under the table of payments appearing on the last page therein. As regards the balance of RM190,000 over the dealer's price of RM271,000, this is evidenced by exh KKH12 to the supporting affidavit of the plaintiff that it was paid by the plaintiff to the dealer and it was so admitted by the first defendant in para 8 of his defence and para 10.3 of his affidavit-in-opposition affirmed on 26 September 1991. So it is beyond doubt that the first defendant intended to contract with the company of the plaintiff and had so contracted by his signing of the agreement in KKH2 though the company by then had changed its name from Malaysia Borneo Finance Corporation (M) Bhd to MBf Finance Bhd. So it does not speak well for the first defendant to dispute that he was not contracting with MBf Finance Bhd. If further evidence is required, the guarantee agreement, KKH3, by which the second defendant has bound herself, is an agreement between the second defendant and MBf Finance Bhd citing the hire-purchase agreement number which KKH2 is concerned with. Also, on the first defendant's copy of the agreement exhibited as TKK1 to the affidavit-in-opposition of the first defendant, MBf Finance Bhd with its Kuching address was stamped on the top first page of the agreement. It is rather unfortunate that the plaintiff has opened the room for argument by the defendants for not having prepared a proper form of agreement such as KKH2 by changing its name to MBf Finance Bhd as the party to the agreement. The form is a printed one which must have been used during the time the plaintiff was under its old name but when the change of name took effect the plaintiff did not bother to have the forms modified accordingly in regards to its name. In the circumstances, I am satisfied that this issue is no longer triable.

The defence of the defendants raises also the issue involving the interpretation of various laws. I will now dispose of the matter and decide whether there is any triable issue raised by the defendants to disentitle the plaintiff for a summary judgment under O 14 of the RHC on this issue of law. Firstly, the plaintiff maintains principally that the agreement is not subject to the Act as the said goods are not goods as specified in the First Schedule to the Act to resist the defence that the agreement is void and unenforceable owing to various non-compliances with the provisions of the Act. If the agreement is not governed by the Act then the various defences of the defendants become non-issues. According to s 1(2) of the Act, it is applicable only in respect of hire-purchase agreements relating to the goods specified in the First Schedule. The two units planers, one unit scraper machine, two units automatic turning lathe are clearly not within the First Schedule. What is left is therefore the four units forklifts. The plaintiff says that they are not motor vehicles as listed in the First Schedule but the

defendants say they are. According to the First Schedule, the motor vehicle, in as far as this matter before the court is concerned, must be a goods vehicle (where the maximum permissible laden weight does not exceed 50 cwts). Exhibit KKH18 annexed to the affidavit-in-reply of the plaintiff affirmed on 8 November 1991 is a letter from the counsel for the plaintiff to the Director, Road Transport Department, Kuching dated 11 October 1991 wanting to know the maximum permissible laden weight specified for forklifts of the models specified for the said goods the subject matter of the agreement. By a letter dated 31 October 1991 in Bahasa Malaysia which certified true translation is exhibited as evidence, the reply came from the said Director exhibited as KKH19 to the said affidavit as follows:

Messrs Loke, King & Co Advocates
PO Box 2457
93748 Kuching

Dear Sirs

Re: Laden weight for 'forklift'

Thank you for your letter FT/js/M729/90 dated 11 October 1991.

2 For your information, this department is only responsible for maximum permissible laden weight for goods vehicles only.

3 A 'forklift' is not considered as one of goods vehicles. For registration purposes, a 'forklift' is classified as 'mobile machinery' and not 'goods vehicles'.

4 If you do not quite understand the phrase 'laden weight', please see the definition for 'unladen weight' in s 2 of the Road Transport Act 1987. So 'laden weight' means weight of load plus the unladen weight.

That is all.

'Serving the country'

Yours faithfully
—Sgd—
Henry SC Chan
for the Director
Road Transport Department
Sarawak

It is clear from the reply received from the road transport authority that a forklift is not a motor vehicle. Since it is not a motor vehicle, the question of its laden weight does not any longer arise for determining whether or not the four units forklifts included in the said goods are items within the First Schedule to the Act. They are not, and therefore the agreement is not caught by the Act. That being the position, the various defences by the defendants concerning the Act become non-issues.

Though it is not a hire-purchase within the province of the Act, any hire-purchase instrument involving movable property is required by s 4 of the Hire-purchase Registration Ordinance of Sarawak (Cap 71) to be registered.

Both the defendants in their respective defence alleged that the agreement in question is not enforceable on the ground that it was not registered as such, as there does not appear on the hirer's copy of this fact of registration. At para 7.1 of the affidavit-in-opposition affirmed on 26 September 1991 for the first defendant, it states that the agreement does not have endorsed on it a rubber stamp mark identifying the registration number and date of registration. It only bears RM3 worth of stamp cancelled by the registrar. The answer is to be obtained in para 5 of the affidavit of Robin Wee Ewe Teck for the plaintiff affirmed on 28 September 1991 which states that the agreement and the guarantee agreement were contained in one single document which was duly registered with the registrar on 20 April 1989 as shown by the endorsement made at the foot of the guarantee agreement which is KKH3. Exhibit KKH9 to the affidavit in support of this application by the plaintiff is a letter from Robin Wee Ewe Teck for the plaintiff to Kementerian Perdagangan dan Perindustrian, Kuching dated 20 April 1989 forwarding the agreement for registration. The registration fee of RM5 was acknowledged vide Receipt No F 901187 dated also 20 April 1989. It is to be noted that the Ordinance, while requiring a hire-purchase agreement to be registered, does not require a guarantee agreement arising therefrom to be registered. In the circumstances, in the light of KKH 9, the evidence in the said para 5 of Robin Wee Ewe Teck's affidavit, and the fact of endorsement by the registrar at the foot of the guarantee agreement, I hold that this hire-purchase agreement had been duly registered pursuant to the Hire-purchase Registration Ordinance of Sarawak (Cap 71). So, again this issue is not triable.

Also, the defendants contends that the agreement is not enforceable against them as it was not executed in the manner required by the Companies Act 1965 in the sense that it was not signed by the directors of the plaintiff and the common seal of the plaintiff not attached thereto by the plaintiff. At para 7.3 of the first defendant's affidavit-in-opposition affirmed on 26 September 1991, it went further to state that there is nothing in the agreement to suggest that the unnamed signatory is in fact authorized to sign the agreement under the authority of a resolution of the board of directors of Malaysia Borneo Finance Corporation (M) Bhd. Robin Wee Ewe Teck for the plaintiff in his affidavit affirmed on 28 September 1991, who was the witness to the signing of the agreement said that the signature is that of Chua Chai Hua the then branch manager of the plaintiff. Being the representative of the plaintiff, I am of the view that Mr Chua Chai Hua had the implied authority of the plaintiff and this agreement is of the nature that no seal of the company is required. See s 35(5) of the Act. Hence, this issue is not triable.

In his defence at para 9, the first defendant alleged that the agreement in fact is a bill of sale pursuant to the Bills of Sale Ordinance (Cap 68) of Sarawak and for failure to attest and register the agreement in accordance and in pursuant of the Ordinance, the agreement is void. He relied on an Invoice No HSH 1859/89 dated 30 March 1989, which is KKH10, issued by the dealer mentioned above. I have held earlier that this agreement was registered according to the Hire-Purchase Registration Ordinance of Sarawak (Cap 71), not because it was a bill of sale but because it is a hire-purchase

agreement though not one governed by the Hire-purchase Act 1967. I will now proceed to decide whether this agreement is a bill of sale as contended by the defendants.

I have touched on exh KKH10 at para 16 above when dealing with the issue of the parties to the agreement. Without having to repeat them as to the background, I would merely say that according to para 7 of the defence by the first defendant, the first defendant says that to show his good faith and to confirm that it will hire the said goods through a hire-purchase agreement from the plaintiff, it paid a down payment of RM81,000 to the dealer. It is in evidence that the balance of RM190,000 was paid by the plaintiff. Such being the case, the dealer received the price for his goods from two sources, ie from the first defendant and the plaintiff. So the contention of the defendants that the payment of the balance sum of RM190,000 by the plaintiff to the dealer amount to a loan to the dealer by way of the dealer pledging the first defendant's goods as security to the plaintiff without interest and in return for which the dealer granted title and property in the said goods to the first defendant does not hold any weight at all. In any hire-purchase transaction with a financier like the plaintiff, it is always the case that the financier will not normally undertake to finance for the full price of the goods the subject matter of a hire-purchase agreement. The hirer is normally required to bear a certain percentage of the total cash price of the goods leaving the balance to be financed under the hire-purchase agreement with the financier. So in this case, that percentage of the cash price of the goods is the sum of RM81,000 paid by the first defendant to the dealer. By this transaction, it does not mean that the dealer had granted exclusive title and property in the said goods to the first defendant as alleged by it. The title to the property initially vested in the dealer as the original owner of the said goods to be sold at the price of RM271,000. This price was paid subsequently to the dealer when the dealer received the sum of RM81,000 from the first defendant and the balance of RM190,000 from the plaintiff. Hence, the dealer had divested its title to the goods in question on the receipt of the price for the goods. In whom has the goods now been vested? To my mind, the title to the goods has been legally vested in the first defendant and the plaintiff jointly according to the proportion of the payments made by both of them. It does not belong to any one of them to the exclusion of the other.

One of the definitions of the term 'bill of sale' in the Ordinance as provided by s 3 is as follows:

> ... 'bill of sale' also includes agreements for the hire of personal chattels entered into for the purpose of securing the repayment to the lessor of such chattels of money advanced by him to the hirer, and the hirer shall in every case be deemed to be the grantor of the bill of sale and the lessor shall be deemed to be the grantee thereof.

The operative words in the definition is 'the lessor of such chattel'. It connotes the exclusive title to such chattel being in the lessor upon which he can assign, transfer, create a trust, etc. Personal chattel is defined by the Ordinance to mean inter alia, goods, furniture and other articles capable of complete transfer by delivery. So, by this definition, in order for the agreement

in this case to be construed as a bill of sale the plaintiff or the first defendant must be having exclusive title in the said goods to the exclusion of the other. But as stated earlier, the title to the said goods in this case is not exclusive to the plaintiff or the first defendant and in the circumstances, the agreement in question is not a bill of sale. In the premises, the argument by the first defendant on this issue must fail. So there is no issue in this respect to be tried.

In the defence, the first defendant also disputes the quantum of the claim by the plaintiff on the ground that the plaintiff has failed to mitigate the loss suffered pursuant to s 75 of the Contracts Act 1950. The plaintiff in reply to the defence so raised, at para 12 denied the allegation saying that by a letter dated 29 October 1990 to the first defendant, the plaintiff demanded the first defendant to deliver up the said goods to the plaintiff but it failed or refused to do so. Further, the plaintiff was not able to repossess the said goods as they were not kept at the address given in the agreement and could not be located. Clause 5 of the agreement stipulates that in the event of default by the first defendant in punctually paying the sum payable under the agreement, the plaintiff can without notice terminate the agreement or by written notice to the first defendant forthwith determine the contract and the first defendant shall forthwith at its expense deliver up the said goods to the plaintiff and the plaintiff shall be entitled without notice to seize and take possession thereof. The consequence which flows from this clause in the agreement is that on the happening of the event, the said goods will come back into the possession of the plaintiff either by the first defendant delivering up the said goods to the plaintiff or the plaintiff would seize or take possession thereof. In this case, by the said letter which is exhibited as KKH5 to the affidavit in support of the plaintiff, it becomes the duty of the first defendant to deliver up the goods to the plaintiff. So, for the first defendant's failure to deliver up and the plaintiff's failure to seize or take possession thereof for the reason given by the plaintiff, the plaintiff cannot be faulted. In the circumstances this ground also fails to raise any triable issue. In any event, s 75 of the Contracts Act 1950 is irrelevant in this respect as the section refers to liquidated damages and penalty imposed in the contract between the contract between the parties in the event of breach. If the stipulation for increased interest from the date of default, in this case at 2% per mensem over delay in payment can be construed as a penalty, the first defendant cannot be absolved of his obligation for, the plaintiff is still entitled to receive reasonable compensation. As to the amount of reasonable compensation, it is dependent on whether or not he is required to mitigate his loss. I am satisfied with the explanation given by the plaintiff that it was not able to take possession of the said goods on the ground that the said goods could not be traced at the address given by the first defendant in the agreement. On the other hand, the first defendant had not discharged his obligation under the agreement in returning the said goods to the plaintiff on termination of the agreement by the plaintiff. Therefore, this issue is also not triable.

Further, the defendants contend that the agreement relating to the payment of the initial deposit for the price of the said goods by the first

defendant, the terms of the monthly instalment payments, and the interest on the overdue hire rentals or other payments at the rate of 2% per calendar month are not duly accepted or agreed upon by the parties to the agreement by signature or signing the initial thereon and as such they were never incorporated in the agreement by acceptance. I find it hard to accept this contention. They form part and parcel of the agreement. The first defendant admitted to the signing of the agreement in KKH2. Though the pages to the agreement comprising of three pages were not numbered, they run in sequence and the parties had signed on the last page of the agreement. So it is vexatious on the defendants' part to say that just because no signatures or initials appeared against the respective clauses, they do not form part of the agreement. So, this is again not a triable issue.

So much for the common defence put up by both defendants. As for the second defendant who is a party to the 'guarantee and indemnity of hire-purchase agreement' in KKH3 to the supporting affidavit of the plaintiff ('the guarantee agreement'), she undertook to jointly and severally guarantee all the obligations of the first defendant under the agreement. She also covenanted to jointly and severally indemnify the plaintiff against all loss or damage the plaintiff may sustain under the agreement with the first defendant and that her liability under the guarantee shall not in any way be discharged, diminished or affected by the invalidity or unenforceability of the said agreement with the first defendant. In her defence to the claim by the plaintiff, she pleaded that her agreement with the plaintiff was void in that the agreement contained material misrepresentation about the principal agreement. The alleged material misrepresentation is over the address of the first defendant. This is contained in para 3.2 of her defence. She filed no affidavit-in-opposition to this application of the plaintiff. No submissions were made by counsel over this matter either before the learned deputy registrar or before me on this appeal. However, the learned deputy registrar in her ruling held that to be a non-issue. The address of the first defendant appearing on KKH3 (the guarantee agreement) being of Lot 1083, Section 66, Pending Industrial Estate, Kuching, was in fact the address given by the first defendant on the application for hire-purchase finance which is KKH8. At any rate, the second defendant herself stated on KKH3 that her employer was Forward Enterprise, the first defendant, which address was Lot 1083, Bintawa Industrial Estate, Kuching. So I cannot agree more with the learned deputy registrar on her finding. In the circumstances, this cannot be a triable issue at all.

In the light of the above. I am satisfied that the first and second defendant has failed to raise any triable issue to defeat the plaintiff's application for summary judgment under O 14 of the RHC, as both the defendants have no defence to the action by the plaintiff. I therefore confirm the decision of the learned deputy registrar on this.

*Application to strike out the first defendant's counterclaim under O 18 r 19 of the RHC*

The counterclaim of the first defendant involved two matters. One is in relation to the plaintiff's claim in the action and the other is related to the

dealings between the plaintiff and the 'first defendant trading under the name and style of Borneo Welded Mesh'. The first defendant in this present action is sued in the capacity of trading under the style of Forward Enterprise. So, if there is going to be a counterclaim by Borneo Welded Mesh, they must first be a claim by the plaintiff against it. In this case there is none. So, Borneo Welded Mesh is a stranger to the action. The mere fact that Ting Kah Kuong is concerned with firms other than Forward Enterprise and the mere fact that the plaintiff had dealings with Ting Kah Kuong's other firms, if Forward Enterprise is sued by the plaintiff, as in this case, Ting Kah Kuong trading under the name and style of Forward Enterprise cannot counterclaim against the plaintiff in the suit, in respect of the plaintiff's dealings with Ting Kah Kuong's other firms. He may be the same person in all the firms concerned but the identity of each of the firm is distinct. Therefore, in this present action it is not proper for the present first defendant to counterclaim against the plaintiff over the plaintiff's dealings with the Borneo Welded Mesh. Borneo Welded Mesh has to file a separate action against the plaintiff citing the plaintiff as the defendant and the first defendant trading under the name and style of Borneo Welded Mesh as the plaintiff. The present first defendant cannot on behalf of Borneo Welded Mesh in his action with the plaintiff counterclaim against the plaintiff in this action. On this score, the counterclaim by the first defendant in respect of dealings between the plaintiff and Borneo Welded Mesh is clearly vexatious and an abuse of the process of court. In the circumstances, that part of the counterclaim of the first defendant against the plaintiff is struck out with cost to the plaintiff. There remains, therefore, only in respect of the first defendant's counterclaim against the plaintiff in relation to this action by the plaintiff against the first defendant to be reckoned with.

Paragraphs 16 and 17 of the counterclaim of the first defendant hinged on his contention that the plaintiff's lack of title in the said goods and therefore, counterclaim for the sum of RM53,664 paid by him to the plaintiff under the agreement as a debt due to him under s 30(2) of the Act. As I have ruled above, that the Act is not applicable to the agreement in question, this issue therefore, does not arise. I, therefore, fully agree with the learned deputy registrar that this part of the first defendant's counterclaim discloses no reasonable cause of action and is vexatious. I agree with the learned deputy registrar that paras 16 and 17 of the counterclaim, therefore, should be struck out. I, therefore, strike out the paragraphs accordingly.

Next comes to the issue of the counterclaim as is found in para 18. The first defendant in relation to this paragraph, prays for various orders as stated at para 10 above.

Those prayers are sought on the basis that the plaintiff had a duty to mitigate its alleged loss. In the light of what I said on this issue earlier at para 25 above, this part of the counterclaim is again clearly unarguable, frivolous and vexatious. In agreement with the decision of the learned deputy registrar, I accordingly strike out the counterclaim in the said paragraph.

In the event, the whole counterclaim of the first defendant is without any basis and I, therefore, allow the application of the plaintiff under O 18 r 19

of the RHC. To that extent, the decision of the learned deputy registrar striking out the first defendant's counterclaim in part is varied as the remaining part cannot subsist.

*Decision in the appeal*

The appeal by the defendants against the decision of the learned deputy registrar is hereby dismissed with costs to the plaintiff to be taxed unless agreed. The order of the learned deputy registrar for the entry of final judgment under O 14 against the first and second defendants in the sum of RM198,711.88 with interest at 2% per calendar month from 14 November 1990 until full and final settlement, is hereby affirmed. The decision of the learned deputy registrar on the counterclaim of the first defendant is varied in the sense that the whole of the counterclaim by the first defendant is struck out.

*Order accordingly.*

Reported by Yap Foo Ken